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OCT 10 1960
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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 474

KENNETH GRAVES and KENNETH DAVIS, *Petitioners,*

vs.

ANSCHUTZ OIL CO., INC., a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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THE ARGUS PRESS, SEATTLE

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Petitioners Kenneth Graves and Kenneth Davis, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on the 12th day of July, 1960.

OPINIONS BELOW

The opinion of the District Court for the District of Wyoming is unreported, but is set forth in the Transcript of Record printed for the Court below at pp. 16 to 20. The opinion of the Court of Appeals for the Tenth Circuit is unreported.

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was made and entered on the 12th day of July,

1960, and a copy thereof is appended to this petition in Appendix B at pp. 9-20. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code (28 U.S.C. 1254 (1)).

QUESTIONS PRESENTED

In a Civil Action on contract, may the trial court and the Circuit Court of Appeals hold in effect that petitioner waived a requirement of the contract where no affirmative defense was pleaded by respondent as required by Rule 8(c) Federal Rules of Civil Procedure, where timely objections were consistently made to evidence of affirmative defenses; where the trial court expressly did not receive evidence to show waiver; and where respondent's counsel in open court represented that he did not offer any evidence to show waiver?

Is not petitioner denied procedural due process where a Federal Court deliberately disregards a significant rule of Federal Civil Procedure?

FEDERAL RULES INVOLVED

Rule 8(c), Federal Rules of Civil Procedure, is set forth in the Appendix at page 8.

STATEMENT

There is but a single principal issue in the case—did respondent, Anschutz Oil Co., Inc., fully and completely perform its contract with petitioners, Kenneth Graves and Kenneth Davis? The trial court held it had, petitioners maintained the evidence wholly refuted this conclusion.

The petitioners, Kenneth Graves and Kenneth Davis (plaintiffs below) hereinafter referred to as Graves-Davis, contracted (R. 5) with respondent, Anschutz Oil Co., Inc. (defendants below), hereinafter referred to as Anschutz, for the drilling by Anschutz of an exploratory test well for oil and gas in the Big Horn Basin, near Lovell, Wyoming, on properties under lease to Graves-Davis.

The trial court found that Anschutz drafted the contract and submitted it to Davis for execution (R. 16). It expressly provided that "contractor shall be entitled to no compensation for any partial performance hereof, or upon any basis other than full and complete performance" (R. 5, 6). Thereafter Anschutz commenced drilling and during the process broke off a lower section of surface casing which lodged in the hole (R. 42, 44, 102).

Repairs were attempted and drilling resumed, but thereafter Anschutz had constant difficulty getting past the broken casing (R. 130). Oil shows appeared in core samples of the Embar formation (oftentimes a commercially productive zone in the Big Horn Basin) near the 4,823-foot level. Graves-Davis' geologist ordered a drill stem test pursuant to the terms of the contract (R. 212) to determine the productivity of the zone. Every effort to run this test failed because of the broken casing (R. 138). Thereafter the hole was drilled approximately 187 feet deeper into the Tensleep formation. Cores and electrologs were taken and the well was plugged and abandoned. Every means known at the time was used in a futile effort to make the test (R.